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DIVISION II

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STATE OF WASHINGTON

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IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

RENE P. PAUMIER

Appellant.

PETITION FOR REVIEW

Court of Appeals No. 36346-1-II
Appeal from the Superior Court for Mason County
The Honorable Toni A. Sheldon
No. 07-1-00060-7

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A. IDENTITY OF PETITIONER

Your petitioner for discretionary review is the STATE OF WASHINGTON, MASON COUNTY, the plaintiff and respondent in this case.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the published opinion in the Court of Appeals, Division Two, No. 36346-1-II, that was filed on April 27, 2010. A Motion for Reconsideration has not been filed by the petitioner in the Court of Appeals. A copy of the published opinion is attached to this petition in Appendix A1 through A19.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Momah¹ and/or Strode² have been “eclipsed” by Presley⁴?
2. Whether Paumier invited error under Momah by first participating in the in-chambers voir dire, benefiting from it, and then assigning error on appeal?
3. Whether Presley “resolved”⁵ the issue of whether Momah and Strode violate a prospective juror’s rights under HIPAA⁶?

¹ State v. Momah, 167 Wash.2d 140, 217 P.3d 321 (2009).

² State v. Strode, 167 Wash.2d 222, 217 P.3d 310 (2009).

³ State v. Paumier, ---P.3d---, 2010 WL 1675171 ¶ 24 (April 27, 2010).

⁴ Presley v. Georgia ---U.S.---, 130 S.Ct. 721, ---L.Ed. 3d--- (2010)

⁵ Paumier, 2010 WL 1675171 ¶ 25.

⁶ Health Insurance Portability and Accountability Act.

4. Whether the trial court improperly denied Paumier the right to self-representation even though the jury had already been selected?

D. STATEMENT OF THE CASE

As argued in the State's Brief of Respondent filed with the Court of Appeals, Division Two, on January 15, 2008, and in its Supplemental Briefing filed on November 30, 2009, which sets out the facts and law relevant to this petition and is incorporated by reference, Paumier was convicted of residential burglary and theft in the third degree. On appeal, the Court of Appeals, Division Two, reversed his convictions, holding that under Presley, the trial court improperly excluded the public from a portion of Paumier's trial and improperly denied Paumier the right to represent himself.

It is respectfully submitted to the Court that this decision contains multiple errors because: (a) under the rationale of Momah, Paumier made a tactical decision and interviewed prospective jurors in chambers; (b) Presley did not resolve the conflict between state and federal law that Momah and Strode have with HIPAA because jurors should not be forced to disclose confidential medical information; and (c) the trial court was correct in denying Paumier's motion to pro se because the jury had already

been selected. The State respectfully requests the Court to grant the State's petition for review in Paumier's case.

E. ARGUMENT

1. MOMAH AND STRODE HAVE NOT BEEN ECLIPSED BY PRESLEY BECAUSE THE CASES ARE BOTH FACTUALLY AND PROCEDURALLY DISTINGUISHABLE.

In Presley, the trial court noticed a solitary observer in the courtroom prior to the start of voir dire. Presley, 130 S.Ct. at 722. The trial court judge explained to this individual, who happened to be the defendant's uncle, that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely. Although defendant Presley's attorney repeatedly objected to the exclusion of the public from the courtroom, the trial judge explained that there was no space for [spectators] to sit in the courtroom during voir dire, and that it would be inappropriate for them to intermingle with the venire. Following defendant Presley's conviction, he moved for a new trial based upon the exclusion of the public from the juror voir dire.

The U.S. Supreme Court ultimately accepted the case and ruled in a per curiam opinion that trial courts are required to consider alternatives to closure even when they are not offered by the parties, which includes the voir dire process. Presley, 130 S.Ct. at 724. The Court further

reasoned that the public has a right to be present whether or not any party has asserted the right. Presley, 130 S.Ct. at 724-725. Addressing the trial court's concerns about spectators intermingling with the venire, the Court reasoned that:

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire. But in those cases, the particular interest, and threat to that interest, must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Presley, 130 S.Ct. at 725.

The key, factual difference in Paumier's case is that there is no record that anyone was ejected from the courtroom, as there was in Presley. In this respect, Paumier's case is distinguishable from Presley, but comparable to both Momah and Strode, as there is no record that anyone was asked to leave the courtroom in either of those cases. Because Presley is factually and procedurally dissimilar from Paumier's case, its holding is inapplicable here.

2. PAUMIER INVITED ERROR UNDER MOMAH BECAUSE HE PARTICIPATED IN THE IN-CHAMBERS VOIR DIRE BENEFITED FROM IT AND THEN ASSIGNED ERROR ON APPEAL.

The Court enunciated a clear rule in Momah in that because that defendant affirmatively accepted the closure, argued for the expansion of

it, actively participated in it, and sought benefit from it, he did not have a valid argument under the invited error doctrine. Momah, 167 Wash.2d 155-156. In Paumier's case, the defendant did not object to the in-chambers voir dire, participated in and benefited from it by selecting a jury that he felt was impartial. Under the rationale of Momah, Paumier made a tactical decision and should not be allowed to assign error to it on appeal.

3. PRESLEY DID NOT RESOLVE THE ISSUE OF WHETHER MOMAH AND STRODE VIOLATE A PROSPECTIVE JUROR'S RIGHTS UNDER HIPAA BECAUSE THOSE TWO CASES ARE IN CONFLICT WITH FEDERAL LAW.

The Court of Appeals erred by summarily concluding the Presley "resolves the matter" that Momah and Strode would violate a juror's right to keep his/her medical information private, because forcing any juror to disclose that information either in open court or in chambers would violate HIPAA. Paumier, 2010 WL 1675171 ¶ 25. Hypothetically, even if the court had closed the courtroom in Paumier's case and conducted a Bone-Club⁷ test, Juror No. 7 still would have had to disclose confidential medical information to the judge, both counsel, the defendant and the clerk at the very least. SUPP RP: 12:1-7. None of the leading Washington

⁷ State v. Bone-Club, 128 Wash.2d 254, 906 P.2d 325 (1995)

State cases discussed here, namely Momah, Strode and/or Bone-Club, either resolve or avoid a direct conflict with HIPAA.

4. THE TRIAL COURT DID NOT IMPROPERLY DENY PAUMIER THE RIGHT TO SELF-REPRESENTATION BECAUSE HE MADE HIS REQUEST AFTER THE JURY HAD BEEN SELECTED.

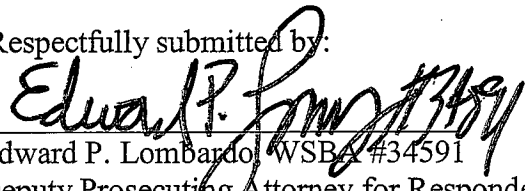
Under the rationale of State v. DeWeese⁸, Paumier's declaration that he wanted to proceed pro se after the jury had been selected should be viewed as untimely. While the Court of Appeals reasoned that the trial court erred in denying Paumier's request as untimely because the jury had been selected but not yet sworn is erroneous. The record shows that all parties committed a significant amount of time and effort to selecting the jury in Paumier's case, and to have allowed him to proceed pro se at that point would have been to run afoul of the rule enunciated in DeWeese: "[a] defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial." DeWeese, 117 Wash.2d at 379. Hypothetically, had Paumier made his request during voir dire before the jury was selected but not sworn, his argument might have greater merit. Because the trial court was on the verge of starting testimony, however, it did not err by denying Paumier's request.

F. CONCLUSION

The State respectfully requests the Court to accept review for the reasons stated in Section E, reverse the Court of Appeals, and reinstate Paumier's convictions for residential burglary and theft in the third degree.

Dated this 21st day of MAY, 2010

Respectfully submitted by:


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⁸ State v. DeWeese, 117 Wash.2d 369, 816 P.2d 1 (1991).

State's Appendix A1 through A19

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STATE OF WASHINGTON

BY DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 36346-1-II

Respondent,

v.

RENE P. PAUMIER,

PUBLISHED OPINION

Appellant.

BRIDGEWATER, J. — Rene Paumier appeals his convictions for residential burglary and third degree theft. Because we hold that the trial court improperly excluded the public from a portion of Paumier's trial and improperly denied his right to represent himself, we reverse his convictions and remand for further proceedings.

FACTS

When Jason Howland returned home after a weekend outing, he discovered that the back door to his residence had been broken open and that several items had been taken from his bedroom, including three knives, two watches, belt buckles, baseball hats, and other clothing items. He called police, who began an investigation regarding the burglary.

Police became interested in Paumier after they interviewed a neighbor who reported having seen Paumier during the weekend of the burglary exit the front of Howland's house and walk down the street. A police officer contacted Paumier, advised him why he wanted to speak

with him, read Paumier his *Miranda*¹ warnings, and requested to search his person and the backpack he was carrying. Paumier consented to being searched, and police found a knife and a belt buckle that Howland identified as having come from his bedroom. The State ultimately charged Paumier with residential burglary and second degree theft.

Following the trial court's rulings on motions in limine, jury selection began on May 8, 2007. The trial court stated at the outset that potential jurors who preferred to answer questions privately to avoid possible embarrassment would be taken into the judge's chambers. Several jurors indicated during the course of voir dire that they preferred to answer certain questions in chambers. The judge and the parties questioned five jurors in chambers, recording the jurors' responses.² Jury selection was completed that same day.

The following day, the trial court permitted the State to amend the information. 1 RP at

8. Paumier then pleaded not guilty and asked to represent himself, stating:

I just don't feel like a—I feel like there's [sic] things about the trial getting this far that it shouldn't have. And I feel that my attorney should have spoke [sic] up for me instead of getting pissed off at me in court. And I just don't feel like he's doing his job like he should. I don't feel it should have gotten this far, and I'd just rather present my, you know, case myself.

1 RP at 9. The court denied the request noting that it came too late. "We have already picked our jury and we're ready to begin trial at this point, and the Court will find that the request is untimely." 1 RP at 9.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² Rather than a court reporter, the court used a digital recording system with cordless microphones to make the record.

Following trial, the jury found Paumier guilty of residential burglary and the lesser included offense of third degree theft. The court sentenced Paumier to 25 months in prison for the burglary and 365 days in jail for the theft, suspending the theft sentence upon compliance with a 24-month probation term.

Paumier appealed, arguing that his right to a public trial had been violated and that the trial court improperly denied his request to proceed pro se. On May 1, 2008, we ordered proceedings stayed pending our Supreme Court's decision in *State v. Strode*, no. 80849-0, addressing the public trial issue. On October 8, 2009, our Supreme Court issued its decision in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), along with a companion case, *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009).³ We lifted the stay on November 3, 2009, and ordered the parties to provide supplemental briefing on the impact of *Strode* and *Momah* on this case. The parties have provided that briefing and we now consider Paumier's appeal.

DISCUSSION

Public Trial Right

Paumier argues that by conducting a portion of the jury selection in the privacy of chambers the trial court violated his constitutional right to a public trial. We agree.

The state and federal constitutions guarantee the right to a public trial. Article I, section 22 of the Washington Constitution provides: "In criminal prosecutions the accused shall have

³ While *Strode* was pending, the Department of Corrections released Paumier from custody in July of 2009. His appeal is not moot, however, because Paumier asks us in part to reverse his conviction.

the right . . . to have a speedy public trial.” The Sixth Amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” Moreover, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This provision secures the public’s right to open and accessible proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). These provisions assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004). While the public trial right is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. *Easterling*, 157 Wn.2d at 174-75; *Brightman*, 155 Wn.2d at 509; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004); *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

The guaranty of open criminal proceedings extends to voir dire. *Orange*, 152 Wn.2d at 804. In *Bone-Club* and *Orange*, our Supreme Court set out the standards for closing all or any portion of a criminal trial. *Bone-Club*, 128 Wn.2d at 258-59; *Orange*, 152 Wn.2d at 805. *Bone-Club* adopted a five-part analysis designed to protect a criminal defendant’s right to a public trial.⁴ *Bone-Club*, 128 Wn.2d at 258-60; see also *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982) (setting forth five-part analysis under article I, section 10).

⁴ The *Bone-Club* analysis provides:

Relying on these cases, Division Three held in *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007), that the trial court must engage in the five-part *Bone-Club* analysis before conducting all or a portion of voir dire outside of the public forum of the courtroom. *Duckett*, 141 Wn. App. at 802-03. In *Duckett*, as here, the trial court had conducted a portion of voir dire in chambers without engaging in the *Bone-Club* analysis. The *Duckett* court held that the failure to address the *Bone-Club* analysis and enter findings and conclusions on each factor required reversal and a new trial. *Duckett*, 141 Wn. App. at 803, 805, 809; *see also State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007).

Noting “the court’s independent obligation to safeguard the open administration of justice,” *Duckett* held that “[a]ny closure of a public judicial proceeding required the trial court to engage in the *Bone-Club* analysis.” *Duckett*, 141 Wn. App. at 804, 807. Here, as in *Duckett*, “only a limited portion of voir dire was held outside the courtroom” but that “does not excuse the failure to engage in a *Bone-Club* analysis.” *Duckett*, 141 Wn. App. at 808. Here, as in *Duckett*,

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

the trial court violated the defendant's public trial right by conducting a portion of voir dire in chambers without first weighing the necessary factors. "Prejudice is presumed, and the remedy is a new trial." *Duckett*, 141 Wn. App. at 809. *Duckett* was an accurate articulation of the law in Washington prior to our Supreme Court's decision in *Momah*.

As noted, before *Momah*'s publication, Washington case law indicated that courtroom closure implicated considerations in addition to the rights of the defendant, that courtroom closure is a circumstances where the burden is placed on the trial court, and that the court must show why closure is necessary. Before *Momah*, our Supreme Court's precedent made the *Bone-Club* guidelines mandatory and directed that the trial court's failure to employ those requirements was reversible error. Prejudice was presumed and remand for a new trial was required. *Orange*, 152 Wn.2d at 814, 821-22.

In *Momah*, our Supreme Court seemed to back away from its earlier articulation in *Orange* that application of the *Bone-Club* guidelines is required and that the failure to so employ them when closing the courtroom is reversible error. Instead, *Momah* seemed to downgrade the *Bone-Club* guidelines by referring to them as "the better practice" rather than as requirements. *Momah*, 167 Wn.2d at 152 n.2. *Momah* noted that all courtroom closures do not trigger a conclusive presumption of prejudice warranting automatic reversal of convictions and a new trial and holds that "[i]n each case the remedy must be appropriate to the violation." *Momah*, 167 Wn.2d at 156.

Momah purportedly applied the United States Supreme Court's decision in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), reading that case to require "a showing that the defendant's case was actually rendered unfair by the closure." *Momah*, 167

Wn.2d at 150. *Momah* pointedly noted that the remedy employed in *Waller* was remand for a new suppression hearing, not a new trial. *Momah*, 167 Wn.2d at 150. *Momah* noted that had the court in *Waller* automatically granted the defendant a new trial without requiring a new suppression hearing, the result would have been an improper windfall for the defendant and such result would not be in the public interest. *Momah*, 167 Wn.2d at 150.

Momah's treatment of the public's interest in open court proceedings is also notable. Prior to *Momah*, this was a separate and equally compelling basis for requiring the trial court to comply with the *Bone-Club* guidelines before closing the courtroom. "[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts. . . . When the courtroom doors are locked without a proper prior analysis under *Orange* and . . . [*Bone-Club*], the people deserve a new trial." *Easterling*, 157 Wn.2d at 187 (Chambers, J., concurring). But while *Momah* acknowledged the public's constitutional interest in open proceedings, see *Momah*, 167 Wn.2d at 147-49 (discussing Wash. Const. art. I, § 10), it opined that the requirement of a public trial "is primarily for the benefit of the accused." *Momah*, 167 Wn.2d at 148. *Momah* seems to conflate the public's and the defendant's interests in an open proceeding and subsume the public's interest under the defendant's interest, at least in the particular circumstances present in *Momah*. *Momah*, 167 Wn.2d at 147-49.

Moreover, *Momah* curiously cites the five *Bone-Club* guidelines (complete with each guideline's mandatory "must" language) and acknowledges that *Bone-Club* provides the appropriate criteria for determining if closure is appropriate, but it does not address the failure to comply with the obligatory language in those guidelines. *Momah*, 167 Wn.2d at 148-49. It

merely notes that if the reviewing court determines that the defendant's right to a public trial was violated it should then "devise[] a remedy appropriate to that violation." *Momah*, 167 Wn.2d at 149.

Despite *Momah*'s seeming retreat from prior Washington precedent, *Momah* nevertheless acknowledged that "structural" error "warrants automatic reversal" and remand for a new trial. *Momah*, 167 Wn.2d at 149. *Momah* identifies "structural error" as one that necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Momah*, 167 Wn.2d at 149-50, 155-56. *Momah* acknowledged that the court closures in *Bone-Club*, *Easterling*, and *Orange* were such "structural" errors. *Momah*, 167 Wn.2d at 150-51. Key to *Momah*'s determination on that issue as to *Bone-Club* and *Easterling*, was the defendant's exclusion from the proceedings in those cases. *Momah*, 167 Wn.2d at 150-51, 155. In *Orange*, the defendant's family was excluded. See *Momah*, 167 Wn.2d at 150-51 (discussing *Orange*).⁵ The *Momah* court distinguished the circumstance before it noting that the defendant affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in the closed proceeding, and benefitted from such closure. *Momah*, 167 Wn.2d at 151-52. Moreover, the purpose of the closure was to safeguard the defendant's right to a fair trial by an impartial jury rather than to protect any other interests. *Momah*, 167 Wn.2d at 151-52. Accordingly, because the defendant in *Momah* affirmatively accepted and actively participated in the closed hearing, our Supreme Court held that the

⁵ Notably, in *Waller*, upon which *Momah* primarily relies, the defendants were not excluded from the pre-trial suppression hearing that was closed to the public. See *Waller*, 467 U.S. at 42.

courtroom closure in that circumstance was “not a structural error” warranting reversal. *Momah*, 167 Wn.2d at 156.

In *Strode*, a plurality decision released the same day as *Momah*, the lead opinion reiterated and applied what was the established law in Washington prior to *Momah*—that it is the trial court’s independent obligation to perform the *Bone-Club* analysis prior to courtroom closure to protect both the defendant’s public trial right and the public’s right to open proceedings. *Strode*, 167 Wn.2d 223, 227-30. Where a *Bone-Club* analysis is not conducted prior to courtroom closure, prejudice is presumed (i.e. structural error which cannot be considered harmless) and automatic reversal is mandatory. *Strode*, 167 Wn.2d 231. Only four justices agreed on all these points. Two more justices concurred in the result, agreeing that in the case under consideration the trial court was required to expressly engage in a *Bone-Club* analysis on the record and its failure to do so required automatic reversal and remand. The concurrence disagreed with the lead opinion to the extent it appeared to conflate the defendant’s public trial right with the interests of the media and the public in open proceedings. “A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.” *Strode*, 167 Wn.2d 236 (Fairhurst, J., concurring in result only).

Accordingly, despite *Momah*, it appears that six justices agree that a *Bone-Club* analysis (or some equivalent) is required prior to closing the courtroom. What was not clear after *Momah* and *Strode* is what the appropriate remedy should be when *Bone-Club* guidelines are not employed prior to closure. Apparently, the reviewing court is to look to the record to see if the trial court employed some equivalent of *Bone-Club* and then fashion a remedy appropriate to the

violation if the trial court failed to engage in an adequate inquiry. As noted, the remedy deemed appropriate in *Momah* (a new hearing) reflected the circumstances of that case; that is, defendant's affirmative acceptance and active participation in the closed proceedings. The appropriate remedy in *Strode* was automatic reversal (six justices agreed) even though the defendant participated in the closed hearing. This was so because no *Bone-Club* analysis (lead opinion) or its equivalent (concurrence) had occurred.⁶

Three months after *Momah* and *Strode*, the United States Supreme Court decided *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 3d ___ (2010), a per curiam opinion holding that under the First and Sixth Amendments, voir dire of prospective jurors *must* be open to the public. *Presley*, 130 S. Ct. at 723-24. This requirement is "binding on the States." *Presley*, 130 S. Ct. at 723. The Court explained that while the accused has a right to insist that the voir dire of the jurors be public, there are exceptions to this general rule. The right to an open trial "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Presley*, 130 S. Ct. at 724 (quoting *Waller*, 467 U.S. at 45). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Presley*, 130 S. Ct. at 724 (quoting *Waller*, 467 U.S. at 45). The *Presley* Court stated that *Waller* provided the

⁶ After *Momah* and *Strode*, it seemed that we would have to await another case for our Supreme Court to clarify the rules and procedures for courtroom closures. That is, whether the five-part *Bone-Club* analysis was mandatory, and what repercussions would follow courtroom closure without such analysis, were issues that seemed to be unsettled after *Momah* and *Strode*.

appropriate standards for courts to apply before excluding the public from any stage of a criminal trial.⁷ *Presley*, 130 S. Ct. at 724.

Noting that “[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials,” *Presley*, 130 S. Ct. at 725, the Court reiterated that “[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.” *Presley*, 130 S. Ct. at 724 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 511, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*)). Moreover “trial courts are required to consider alternatives to closure even when they are not offered by the parties,” this is because “[t]he public has a right to be present whether or not any party has asserted the right.” *Presley*, 130 S. Ct. at 724-25.

Additionally, the trial court must make appropriate findings supporting its decision to close the proceedings.

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases, the particular interest, and threat to that interest, must “be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”

Presley, 130 S. Ct. at 725 (quoting *Press-Enterprise I*, 464 U.S. at 510). The Court held that “even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it

⁷ The *Waller* standards require:

“[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.”

upon it to consider all reasonable alternatives to closure.” *Presley*, 130 S. Ct. at 725. Thus, where the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant’s conviction. *Presley*, 130 S. Ct. at 725.

Thus *Presley*, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including voir dire. Here, the trial court closed a portion of voir dire by interviewing certain jurors in chambers. By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier’s and the public’s right to an open proceeding. *Presley* requires reversal of Paumier’s burglary conviction, and we so hold.

In his supplemental briefing, Paumier argues that this case is factually more like *Strode* than it is like *Momah*. That is so, but as we have explained *Presley* has eclipsed *Momah* and *Strode* and controls the outcome of Paumier’s case.

The State argues in its supplemental briefing that applying *Momah* and *Strode* would violate a juror’s right to keep his or her medical conditions and treatment private under the federal Health Insurance Portability and Accountability Act (HIPAA). Again, *Presley* resolves the matter. As discussed above, *Presley* does not require all proceedings to be open in all circumstances. *Presley* requires a trial court to consider reasonable alternatives to closure and to make appropriate findings explaining why closure is necessary under the particular

Presley, 130 S. Ct. at 724 (quoting *Waller*, 467 U.S. at 48).

circumstances of the case *before* closing the proceeding. Accordingly, a proceeding may be closed under *Presley*, when these requirements are met. *Presley*, 130 S. Ct. at 725.

In sum, for the reasons discussed, we reverse Paumier's convictions for residential burglary and third degree theft.

Right to Self-Representation

Paumier also asserts that the trial court violated his constitutional right to represent himself by summarily denying his request to so proceed. We agree.

A criminal defendant has an independent constitutional right to represent himself or herself without the assistance of legal counsel. *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). The exercise of this right must be requested by the defendant. The request must be knowingly and intelligently made, unequivocal, and "timely, i.e., it may not be used to delay one's trial or obstruct justice." *Breedlove*, 79 Wn. App. at 106. We review the trial court's disposition of a request to proceed pro se for abuse of discretion, mindful of the guidelines enunciated in *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), *review denied*, 92 Wn.2d 1002 (1979).

Under *Fritz*, the trial court's discretion lies along a continuum that corresponds with the timeliness of the request to proceed pro se. Accordingly, where a defendant makes a proper demand for self-representation well before the trial, the right of self-representation exists as a matter of law. Where the demand is made on the eve of trial, the existence of the right depends on the particular facts of the case with a measure of discretion reposing in the trial court. Finally, where the request is made during the trial, the right to proceed pro se rests largely in the informed discretion of the trial court. *Fritz*, 21 Wn. App. at 361; *see also Breedlove*, 79 Wn.

App. at 106-07. Thus, if the request is made just before or during trial, the trial court "must exercise its discretion by balancing the important interests implicated by the decision," namely, the defendant's interest in self-representation and society's interest in the orderly administration of justice. *Breedlove*, 79 Wn. App. at 107.

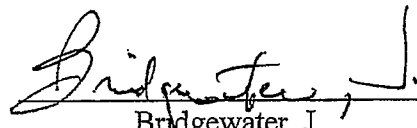
Further, *Breedlove* held that "the timeliness requirement should not operate as a bar to a defendant's right to defend pro se." *Breedlove*, 79 Wn. App. at 109. The *Breedlove* court held that the trial court abused its discretion in denying the defendant's request to represent himself because there was no evidence that his motion was designed to delay his trial or that granting it would have impaired the orderly administration of justice. *Breedlove*, 79 Wn. App. at 110. "The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice." *Breedlove*, 79 Wn. App. at 110; *see also State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (unjustified denial of defendant's right to represent himself requires reversal), *cert. denied*, 523 U.S. 1008 (1998).

Here, Paumier's request to represent himself was made after the jury was selected but before it was sworn. Paumier expressed his dissatisfaction with his attorney and simply said he would rather present his case himself. He did not ask for a continuance.⁸ The trial court denied the request on the sole basis that it was untimely.


⁸ Moreover, Paumier's criminal history, which includes multiple prior theft convictions and a prior burglary conviction, indicates that he was familiar with the charges and perhaps the criminal court proceeding that he faced. Also, defense counsel told the trial court that Paumier "has had copies of discovery throughout the proceedings." 1 RP at 9.

As in *Breedlove*, Paumier's request to represent himself was clear, and there is no evidence that the trial would have been delayed or that granting his request would impair the orderly administration of justice. Accordingly, we hold that the trial court abused its discretion in denying Paumier's request to represent himself.

Because the unjustified denial of this right requires reversal, we reverse Paumier's convictions and remand for further proceedings consistent with this opinion.⁹


Bridgewater, J.

I concur:


Houghton, P.J.

⁹ We would normally order a new trial, but because Paumier is no longer in custody we leave to the parties the pursuit of further proceedings as they deem appropriate.

QUINN-BRINTNALL, J. (dissenting) — Because Rene P. Paumier failed to timely object and preserve the “closed courtroom” issue for our review, I disagree with the majority’s decision to address the merits of the alleged public trial right violation and respectfully dissent. I also disagree with the majority’s reliance on the United States Supreme Court opinion in *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 3d ___ (2010), to reverse Paumier’s convictions.

In *Presley*, without applying the standards set out in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), the trial court, *over the defendant’s objections*, excluded Presley’s uncle (and apparently any other member of the public) from attending the jury selection proceedings, stating that there was insufficient room in the courtroom to accommodate prospective jurors and one observer. 130 S. Ct. at 722. Presley’s counsel expressly objected to the exclusion of his client’s uncle, who might well have been of assistance to the defense in selecting a jury, as well as other members of the public, from the jury selection process. *Presley*, 130 S. Ct. at 722.

Thus, in *Presley*, our nation’s highest Court had before it a trial court that—over the clear objection of the defendant and the observer—closed the courtroom without applying standards necessary to insure protection of the defendant’s Sixth and the public’s First Amendment rights to a public trial. In contrast, Paumier did not assert, and in my opinion waived, his Sixth Amendment right to a public trial by failing to object to the trial court’s decision to allow jurors to answer questions they considered embarrassing in chambers on the record with all parties present.

Although *Presley* holds that the defendant's Sixth Amendment right to a public trial extends to the jury selection process,¹⁰ it does not hold that this error cannot be waived or that the public trial right under the federal constitution need not be preserved for review. *See Reid v. Georgia*, 286 Ga. 484, ___ S.E.2d ___, 2010 WL 423110 at *3 (distinguishing *Presley* on the basis that Reid did not object to the trial court's temporary courtroom closure and reasoning, "The improper closing of a courtroom is structural error requiring reversal only if the defendant properly objected at trial and raised the issue on direct appeal."); *but see State v. Strobe*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) ("defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver [of defendant's public trial right]" (alterations in original) (quoting *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005))). Under the invited error doctrine, a reviewing court should decline to address the merits of a claimed error if the appealing party induced the court to commit the conduct later asserted to be error. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). The invited error doctrine applies even to manifest constitutional errors. *State v. McLoyd*, 87 Wn. App. 66, 70, 939 P.2d 1255 (1997), *aff'd by State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

Here, although Paumier did not actively seek to have jurors questioned about sensitive matters in chambers, the record shows that he participated in the process and accepted the benefit of obtaining more candid answers to embarrassing questions. Accordingly, I would hold that

¹⁰ The United States Supreme Court has similarly held that the public's First Amendment right to a public trial extends to the jury selection process. *Press-Enter. Co. v. Super. Ct. of Cal., Riverside County*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

Paumier has failed to preserve any objection to the trial court's in-chambers questioning of potential jurors for appellate review. I am aware of contrary authority but cannot agree that it rests on sound constitutional basis.

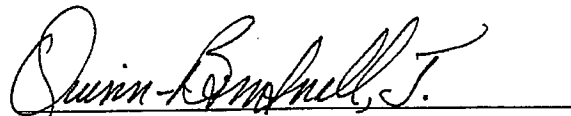
In addition, Paumier lacks standing to assert the public's First Amendment right to a public trial. The standing doctrine generally prohibits a party from suing to vindicate another's rights. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). Neither *Presley* nor any other case expressly holds that a criminal defendant may assert the public's rights to a public trial, although it has ruled on the public's right through a criminal defendant's appeal. *See, e.g., State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

I wholeheartedly agree with the statement in the plurality opinion in *Strode* that a defendant "cannot waive the public's right to open proceedings." 167 Wn.2d at 229. But it does not follow that he has standing to assert that right to overturn a verdict entered by an impartial group, the public's representatives on the jury. Importantly, this is not a situation in which the defendant's and the public's right to a public trial are aligned to the degree that the defendant can fairly represent the public's interest in exercising its public trial rights or impartially decide whether to press to extend precious taxpayer resources on a new trial. In the context of jury selection, those rights may clearly be in conflict. As demonstrated here, Paumier had an interest in allowing jurors to be questioned privately in order to encourage candid answers to his questions. The public, in contrast, has an interest in knowing that the jury selection process was fair and to discover how, by whom, and, in challenges for cause, why potential jurors were challenged or removed from jury service. I continue to believe that the defendant's and the

public's interests in a public trial are not sufficiently aligned to allow a defendant who does not object to a juror's request to be questioned on the record in chambers to remain silent and then allege a violation of the public's right to a public trial for the first time on appeal.

I also cannot agree that the record before us supports a determination that the trial court abused its discretion by denying Paumier's untimely request that he represent himself. Unlike the trial court's file, the record before us in this appeal does not contain any indication of Paumier's level of function or a history of his relationships with counsel. I am loathe to baldly rule that a trial judge has abused her discretion on such an inadequate record.

In addition, Paumier chose to appeal the judgment in this case. Assuming the majority's opinion reversing that judgment stands, the correct remedy is a remand for a new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). As always, following reversal of a defendant's conviction, the State may decide not to retry the defendant or the defendant and the State may reach an agreement. That does not, in my opinion, alter the proper statement of the remedy. The evidence presented at trial was sufficient to support the decision of the fair and impartial jury that rendered it and double jeopardy does not bar retrial. Accordingly, even under the majority analysis, our authority is limited to reversing the judgment and remanding to the superior court for a new trial or other proceeding consistent with the majority opinion.


QUINN-BRINTNALL, J.

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